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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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UNION PACIFIC CORPORATION,  
UNION PACIFIC RAILROAD COMPANY  
AND MISSOURI PACIFIC RAILROAD COMPANY  
— CONTROL AND MERGER —  
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC  
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN  
RAILWAY COMPANY, SPCSL CORP. AND THE DENVER  
AND RIO GRANDE WESTERN RAILROAD COMPANY

UP'S REPLY TO BNSF'S PETITION FOR CLARIFICATION  
REGARDING BNSF INTERFERENCE WITH UP SERVICE

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## TABLE OF CONTENTS

	<u>Page</u>
BACKGROUND .....	3
ARGUMENT .....	5
I. SECTION 10901(D) SUPPLIES THE APPROPRIATE THRESHOLDS FOR INTERFERENCE .....	5
A. The Board Should Apply the Interference Standards of Section 10901 .....	5
B. The BNSF Settlement Agreement Does Not Authorize BNSF to Impose Unreasonable Interference .....	7
II. UP CANNOT BE REQUIRED TO FUND INVESTMENTS TO REMEDY BNSF INTERFERENCE AND HELP BNSF COMPETE.....	8
A. The BNSF Settlement Agreement Allocates Financial Responsibility for Investments to Remedy Interference .....	9
B. BNSF Seeks an Impermissible Subsidy from Its Competitor.....	10
III. THE BOARD SHOULD REJECT BNSF’S RIGID PROCEDURES FOR RESOLVING OPERATING CONFLICTS .....	11
CONCLUSION.....	17

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**UP'S REPLY TO BNSF'S PETITION FOR CLARIFICATION  
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BNSF asks the Board to clarify the standards for determining when BNSF must fund solutions to interference caused by build-ins under the BNSF Settlement Agreement. BNSF-97, Petition of the Burlington Northern and Santa Fe Railway Company for Clarification ("Petition"), December 17, 2001, pp. 1-3. BNSF contends that it has no duty to pay unless the interference is both "unreasonable and material." *Id.* at 9. BNSF also contends that, even when BNSF causes unreasonable and material interference, UP must fund the remedies if necessary to keep BNSF competitive. *Id.* at 12-13. Finally, BNSF asks the Board to impose an inflexible, multi-step procedure that would discourage negotiations to solve operating conflicts and shift BNSF's responsibilities for finding solutions to UP. *Id.* at 9-10.<sup>1</sup>

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<sup>1</sup> BNSF asserts that its Petition raises important issues of transportation policy that will determine whether it is able "to compete effectively on a level playing field" for the next century. Petition, pp. 2-3. BNSF routinely issues warnings about its ability to compete when it wants the Board to enhance its rights or minimize its investments under the BNSF Settlement (continued...)

BNSF's Petition mixes two related but distinct questions. The first is how much interference BNSF's build-ins may impose on UP, other railroads, and their customers. The second is which railroad should pay for a remedy once interference exceeds that threshold. Federal law and the BNSF Settlement Agreement answer both questions in ways that BNSF's Petition does not discuss.

As we explain in Part I, 49 U.S.C. § 10901(d) establishes the appropriate thresholds for interference. Section 10901(d) controls when BNSF constructs a build-in across UP tracks. Moreover, Section 10901 would have established the thresholds for SP and UP build-ins had the railroads not merged. By applying Section 10901's thresholds to the BNSF Settlement Agreement, the Board replicates potential build-in competition that the merger eliminated.

In Part II we address BNSF's suggestions that UP must fund infrastructure in order to keep BNSF competitive, even when BNSF causes unreasonable interference. BNSF offers no legal basis for seeking its competitor's funds. The BNSF Settlement Agreement requires BNSF to pay for facilities required to avoid interference. Moreover, shifting those costs to UP would distort pre-merger competition and require UP to subsidize its competitor.

Finally, in Part III, we explain how BNSF's rigid, one-sided procedures would discourage creative, private solutions to interference problems. They would eliminate BNSF's

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Agreement, even as it continues to compete effectively. See, e.g., BNSF-93, "BNSF's Comments on Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement," July 25, 2001, pp. 8, 19. As the Board reaffirmed last month, BNSF mounts vigorous competition under the BNSF Settlement Agreement. Union Pac. Corp. -- Control & Merger -- Southern Pac. Corp., STB F.D. 32760 (Sub-No. 21) Decision No. 21 (STB served Dec. 20, 2001), slip. op. at 3-4.

incentive to cooperate with UP and impose on UP all of the responsibility for finding remedies for interference.

The Board should confirm that Section 10901(d)'s thresholds apply under the BNSF Settlement Agreement and that BNSF must pay for remedies when its interference exceeds those thresholds. The Board should reject BNSF's unwieldy and unfair procedures.

### BACKGROUND

BNSF filed its Petition because of the parties' disagreements about interference caused by BNSF's proposed build-in to Seadrift, Texas. See maps in Attachment A. Until September 2001, the parties were discussing BNSF's use of UP facilities to reach the Seadrift build-in. Apparently viewing UP's September 24, 2001, letter as overly aggressive, BNSF stopped negotiating. A Board decision would help the parties resume negotiations.<sup>2</sup>

A build-in frequently requires the constructing railroad to interfere with the established railroad's operations. Building a new crossing often forces the existing railroad to suspend operations briefly. After construction, day-to-day operations cause interference when the sponsoring railroad's trains get in the way of the incumbent's trains. Additional interference is virtually inevitable when BNSF constructs a build-in under the BNSF Settlement Agreement, because BNSF not only builds across UP tracks but also uses trackage rights on UP to reach the build-in track.

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<sup>2</sup> BNSF and UP have successfully negotiated operating arrangements for new BNSF service throughout the West. For example, BNSF and UP successfully negotiated arrangements for BNSF service to American Soda Company's huge, new facility in Parachute, Colorado. UP/SP-384, Union Pacific's Fifth Annual Oversight Report, July 2, 2001, pp. 94-95. Last Friday BNSF and UP agreed on BNSF service to a build-in at White Bluff, Arkansas.

Operating interference increases the established carrier's costs. When a BNSF train delays a UP train, UP pays more for fuel. In some cases, it pays overtime to train crews or replaces train crews that run out of time under the Hours of Service Law. UP also pays more per diem on dozens of rail cars. It temporarily loses the use of its investments in cars and locomotives. Multiple trains may be affected. Due to signal spacing and limited capacity, delays to one train ripple up and down a line, delaying others and congesting terminals. Over the course of a year, these costs add up to substantial sums.

Operating interference also harms customers by degrading existing service. When BNSF trains block UP trains, UP's customers suffer shipping delays. For example, a unit coal train may arrive at a power plant later than expected, costing the utility overtime for unloading crews. Auto parts imported through Brownsville may be delayed en route to manufacturing plants in the U.S.

BNSF's Seadrift build-in will affect not only UP and its customers but also Tex Mex and its customers. BNSF's operating plan would require its trains to block two UP lines at an important crossing at Placedo, Texas, for almost two hours per day. One of the lines, used by Tex Mex, is among UP's most congested lines in Texas, and both railroads' trains will suffer delays. In Attachment B, we provide a more detailed description of this interference.

Although UP believes that BSNF's proposed operating plan for its Seadrift build-in would cause extensive interference, we agree with BSNF that this is not the time or place to resolve specific disputes. "BNSF does not seek a resolution of the specific dispute" over the Seadrift build-in (Petition, p. 3), and neither does UP. The Board lacks sufficient facts to resolve that dispute. In the following pages, UP addresses general principles.



ARGUMENT

I. SECTION 10901(d) SUPPLIES THE APPROPRIATE THRESHOLDS FOR INTERFERENCE

Federal law limits interference from a build-in. Section 10901(d) requires the constructing railroad to avoid specified levels of interference when it crosses another railroad's tracks. Section 10901(d) applies to BNSF's crossings of UP tracks, whether under the BNSF Settlement Agreement or otherwise. Section 10901(d) also would have governed any SP or UP build-in across the other had the UP/SP merger not occurred. The Board therefore should consistently apply Section 10901(d)'s thresholds under the BNSF Settlement Agreement whenever BNSF's build-ins cause interference. Nothing in the BNSF Settlement Agreement authorizes BNSF to impose greater delays on UP's customers or higher costs on UP and its tenant railroads.

A. The Board Should Apply the Interference Standards of Section 10901

Section 10901(d)(1) allows a railroad to build in across another railroad subject to statutory limits on interference with the established carrier's operations. The statute allows more interference during construction of the build-in than during ongoing operations. The sponsoring carrier must remedy any interference that exceeds the specified limits.

During track construction, generally a brief period, the sponsoring carrier has substantial leeway to cause interference. Construction may occur if "the construction does not unreasonably interfere with the operation of the crossed line." 49 U.S.C. § 10901(d)(1)(A).



A stricter standard limits interference with ongoing operations. Under 49 U.S.C. § 10901(d)(1)(B), one railroad may cross another only if “the operation does not materially interfere with the operation of the crossed line.”<sup>3</sup> The proponent of a build-in cannot operate across the other carrier if its operations would cause material interference. It must avoid or remedy the interference.

BNSF proposes to apply the more liberal “unreasonable interference” threshold not only during construction but also during ongoing operations.<sup>4</sup> This would allow BSNF to cause forever, more interference than Section 10901(d) permits. BNSF offers no justification for departing from the statutory framework or for imposing greater interference on UP than SP or UP could have imposed on the other had they not merged.

As a matter of law, BNSF must comply with Section 10901(d) when one of its build-ins crosses a UP track. For example, BNSF plans to cross UP’s tracks 12 times to build in to the Bayport Loop near Houston, and it must comply with the statute to effect those crossings.

The Board should confirm that Section 10901(d)'s thresholds apply to any interference from BNSF build-ins under the BNSF Settlement Agreement. Section 10901(d) technically applies only to rail crossings. Because of the extensive trackage rights it received in the UP/SP merger, however, BNSF's build-ins will cause interference not only at rail crossings

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<sup>3</sup> “Unreasonable” has a strong negative connotation and indicates action that is inconsistent with common sense. As defined in Black’s Law Dictionary, “unreasonable” action is “irrational or capricious.” Black’s Law Dictionary 1537 (7th ed. 1999). In contrast, “material” indicates that the topic is of consequence or important. Black’s defines it as “significant” or sufficient to affect decisions. Id. at 991.

<sup>4</sup> Under BNSF’s proposal, BNSF would be responsible only if interference is both unreasonable and material.

but also at other locations on UP's lines. The statutory thresholds for interference should be consistent from one location to another for one build-in and from one build-in to another.

Applying Section 10901(d)'s standards would also implement the Board's policy goals when it imposed the build-in condition on the UP/SP merger. The Board sought to preserve potential build-in competition between SP and UP. Had the merger not occurred, SP and UP today would be required to comply with Section 10901(d) when building new tracks to serve shippers on the other carrier. BNSF should likewise shoulder its responsibilities under Section 10901(d) when it exploits the build-in condition.

B. The BNSF Settlement Agreement Does Not Authorize BNSF to Impose Unreasonable Interference

No provision of the BNSF Settlement Agreement authorizes BNSF to impose greater interference burdens on UP and its customers than Section 10901 allows. Only Section 8(l) of the BNSF Settlement Agreement specifically pertains to the Board's build-in condition. That provision does not define a standard for interference with UP operations.

Section 8(l) protects BNSF by prohibiting UP from forcing BNSF to use a circuitous or unreasonably expensive route to reach a new build-in. When existing trackage rights do not allow BNSF to reach the build-in point, Section 8(l) allows UP to designate BNSF's route but it bars UP from forcing BNSF to use an unreasonable route that might undermine the build-in's viability. Section 8(l) thus requires UP to designate a route that will "minimize the operating inconvenience to UP, consistent with ensuring that BNSF can provide competitive service." Restated and Amended BNSF Settlement Agreement, § 8(l). UP fully complied with that provision for the Seadrift build-in by designating a route through Placedo and requesting a connecting track.

The Board should not convert BNSF's protection against unfair costs into a weapon that allows BNSF to inflict costs on UP. According to BNSF, Section 8(l) "recognizes that some level of interference with UP's operations may occur" and that some interference "is inherent in any increased use of UP's lines." Petition, p. 8. UP agrees, because adding more trains to UP tracks inevitably causes some interference. Section 8(l) does not, however, establish any threshold for interference, much less require UP and its shippers to accept interference until it becomes unreasonable.<sup>5</sup>

II. UP CANNOT BE REQUIRED TO FUND INVESTMENTS TO REMEDY BNSF INTERFERENCE AND HELP BNSF COMPETE

Under the BNSF Settlement Agreement, BNSF must fund new facilities to remedy interference. Section 9 of the agreement provides that the user of the trackage rights must pay for needed facilities.<sup>6</sup> Had UP and SP not merged, each would have been financially

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<sup>5</sup> BNSF mentions, but does not embrace, Section 2(n) of the "Houston, Texas to Brownsville, Texas Trackage Rights Agreement," dated June 1, 1996. Section 2(n) does not apply to build-ins or to connections between two lines over which BNSF received trackage rights in the UP/SP merger, and BNSF does not claim that it does.

Section 2(n) applies only to BNSF's "existing lines of railroad or trackage rights lines." (Emphasis added.) See also Restated and Amended BNSF Settlement Agreement, § 9(m) (differentiating between BNSF's "present lines (including existing trackage rights)" and "Trackage Rights Lines or lines [BNSF] will purchase pursuant to [the Settlement] Agreement").

BNSF would not want Section 2(n) to apply because it requires BNSF to bear all costs and gives UP broad discretion. Section 2(n) requires BNSF to pay all of the costs if additional facilities are necessary to accommodate BNSF operations. See Houston, Texas to Brownsville, Texas Trackage Rights Agreement, § 2(n) ("[I]f sufficient trackage is not available . . . to facilitate [BNSF's] Operations, [UP] may require [BNSF] to construct additional trackage . . . the cost and expense of which shall be borne solely by [BNSF].") BNSF's Petition asks the Board to leave for arbitration or the Board the question of "how [new facilities] should be funded." BNSF-97, p. 10. Section 2(n) explicitly provides that BNSF must bear the full costs of any new facilities.

<sup>6</sup> If both parties will use the facilities, they share the cost.

responsible for avoiding interference by its build-ins, and the BNSF Settlement Agreement preserves that relationship. Never mentioning Section 9 of the agreement, BNSF suggests an extraordinary alternative: if necessary to help BNSF compete, UP should fund facilities to eliminate the unreasonable interference BNSF causes. BNSF bases this inequitable proposal on a misunderstanding of the Board's build-in condition.

A. The BNSF Settlement Agreement Allocates Financial Responsibility for Investments to Remedy Interference

The BNSF Settlement Agreement leaves no room for disagreement about which railroad pays for infrastructure to remedy interference. Under Section 9(b) of the BNSF Settlement Agreement, the costs of facilities needed to implement "trackage rights granted under this Agreement" are borne "by the party receiving the trackage rights which such facilities are required to implement." Thus, when BNSF uses trackage rights on UP tracks to serve a build-in, it must fund all facilities required to implement those rights. UP must share those costs only if it uses the new infrastructure: The costs "shall be shared by the parties based on their respective usage of the line in question." Restated and Amended BNSF Settlement Agreement, § 9(c)(ii). The Agreement does not modify these responsibilities in order to help one railroad compete against the other.

The Board should reject BNSF's attempt to revoke this agreement. BNSF does not discuss Section 9(b) of the Settlement Agreement or explain how the Board could override it. As the Board recently confirmed, it cannot retroactively impose new standards and obligations on a merger after consummation. Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1) (STB served June 11, 2001), slip op. at 45. The Board should not adopt a

clarification that would release BNSF from its responsibilities under the Settlement Agreement and impose new costs on UP.

B. BNSF Seeks an Impermissible Subsidy from Its Competitor

BNSF wants UP to pay for facilities to remedy interference whenever necessary to ensure that BNSF can use a build-in to compete against UP.<sup>7</sup> More simply, BNSF wants UP to subsidize BNSF's build-ins. For multiple reasons, the Board should reject BNSF's request for UP's funds.

First, as we explain above, BNSF's request conflicts with the terms of the BNSF Settlement Agreement.

Second, BNSF misconstrues the Board's build-in condition. The Board intended to preserve potential build-in competition between SP and UP. It did not intend to transform uneconomic build-ins into viable build-ins by requiring UP to subsidize them or act as an insurer. For example, the Board cannot be understood to have required UP to guarantee the competitiveness of an uneconomic BNSF build-in from Salt Lake City to Boise, Idaho, so that BNSF could carry potatoes.

Third, requiring UP to subsidize a BNSF build-in would not replicate the pre-merger competition between SP and UP. Neither SP nor UP could have sought a subsidy from the other before the merger. SP and UP would have paid all of the costs of their build-ins, including interference costs under Section 10901. Had SP or UP concluded that a build-in did not justify those costs, it would not have constructed the build-in. Nothing in the Board's

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<sup>7</sup> BNSF proposes to allow arbitrators to decide which railroad funds such investments. E.g., Petition, p. 10.

decisions suggests that the Board intended to relieve BNSF of the legitimate costs of a build-in, much less to force UP to pay those costs.

Fourth, BNSF's proposal is impractical. Neither UP nor the Board could evaluate "BNSF's ability to provide competitive service." Petition, p. 5. Whether BNSF's build-in service is competitive hinges on BNSF's freight rates. Indeed, BNSF could raise or lower its rates to make its build-ins appear more or less viable. Moreover, to evaluate BNSF's competitiveness, both parties would need to know the other's rates and costs. BNSF cannot legally disclose rates and costs to UP, or vice versa. Negotiations between the railroads would be impossible, and the Board would have great difficulty resolving disagreements about BNSF's ability to compete.

III. THE BOARD SHOULD REJECT BNSF'S RIGID PROCEDURES FOR RESOLVING OPERATING CONFLICTS

BNSF proposes a four-step procedure under which the railroads would process a BNSF operating plan for a build-in. Petition, pp. 9-10. BNSF also proposes two further "considerations" to influence the procedure in some unspecified way. *Id.* at 9. BNSF's proposals would impose a rigid, legalistic process in place of fluid negotiations in which operating personnel seek practical solutions. They also favor BNSF at every turn. They would give BNSF the power to control UP operations in violation of the BNSF Settlement Agreement and transfer to UP virtually all of BNSF's planning responsibilities for its own build-ins. The Board should reject these unwise and unfair procedures.

For convenience, we quote BNSF's proposed procedures in full. Then we enumerate UP's objections. BNSF proposes:

*When BNSF presents an operating plan to UP to serve a build-in/build-out line, UP is required to approve that operating plan unless the plan will cause unreasonable and material interference with UP's operations.*

*If UP believes that BNSF's proposed operating plan would cause [unreasonable and material] interference, then UP must provide (i) a detailed justification in writing supporting its position, and (ii) a proposed alternative operating plan which will enable BNSF to provide competitive service to the shipper with the least additional cost.*

*If UP's proposed alternative operating plan would require BNSF to construct or fund new facilities or other improvements, then UP is required to provide an explanation of why the operations of the two carriers cannot be coordinated to avoid the need for the construction of new facilities.*

*If, at that point, UP and BNSF continue to disagree as to the need for the construction of new facilities and as to how they should be funded, then the issue "may be resolved either by arbitration or the Board" (see Decision No. 44, 1 S.T.B. at 420).*

Petition, pp. 9-10.

1. BNSF's procedures would transform informal, practical dialog between operating officials into a formal legal process. Railroads cooperate in thousands of joint facilities throughout the nation without formal presentations and written justifications. BNSF's proposal would chill cooperation and replace pragmatic problem-solving by operating officials with position papers by lawyers.

2. BNSF would gain unilateral power to dictate operations by requiring UP to accept BNSF's operating plans for build-ins that do not cause unreasonable and material interference with UP's operations. BNSF could instruct UP how to operate trains -- even UP trains -- on UP's own tracks. BNSF does not attempt to justify this departure from a track

owner's normal right to control operations on its own lines.<sup>8</sup> BNSF could also impose unnecessary costs on its rival by designing plans that impose all delays and costs on UP and requiring UP to accept them.

3. BNSF's procedures would shift to UP the burden of identifying ways to avoid operating interference. As the proponent of a build-in, BNSF should develop an operating plan that minimizes interference with UP operations. Under BNSF's rules, however, BNSF could propose a plan that maximizes BNSF's convenience and minimizes BNSF's costs and responsibilities. UP then would bear the burdens of proposing alternatives and proving that no cheaper alternative would work. UP will cooperate with BNSF in coordinating the operations of the two carriers, but UP should not be required both to identify all of the theoretical operating alternatives and prove that they are unworkable.<sup>9</sup>

4. BNSF's final paragraph reveals how little its one-sided procedures would accomplish. Even after the parties follow BNSF's rules for resolving operating disputes, they would likely disagree about whether interference is excessive. The parties would return to the Board, where they would argue about not only whether new investment is needed but also

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<sup>8</sup> The BNSF Settlement Agreement expressly confirms that "the management and operation of the [trackage rights] shall be under the exclusive direction and control of the owning carrier." Restated and Amended BNSF Settlement Agreement, § 9(d).

<sup>9</sup> BNSF wants UP to develop an operating plan that will allow its competitor "to provide competitive service . . . with the least additional cost." Petition, p. 9. BNSF argues that UP or SP would have pursued a low-cost solution before the merger, so "UP should be put to a similar task." *Id.* at p. 11. BNSF has it backwards. Before the merger, SP and UP developed the low-cost solutions for both carriers when one of them proposed a build-in over the other's tracks. As the proponent of a build-in, BNSF must do the same.



whether the other railroad obeyed the procedural rules. BNSF's procedures would expand the issues for lawyers to fight about but do little to solve operating problems.

\* \* \*

BNSF also proposes two "considerations" for use in evaluating interference disputes: whether railroads engage in similar operations elsewhere, and whether SP would have been required to construct a connection before the UP/SP merger. Petition, p. 9. BNSF does not explain how these considerations would interact with the thresholds for interference with existing operations. If a build-in causes "material" (or, during construction, "unreasonable") interference, the proponent should remedy the interference. If it does not cause interference, no remedy is required.

Similar operations. A rail operation that works at one point may or may not be desirable at another point. One must consider a multitude of factors at each location, including the number of trains using the facilities, priorities of the trains, available capacity, operating alternatives, difficulty of constructing new facilities, opportunities to use personnel in the area, and many other factors. Otherwise, the comparisons are meaningless.<sup>10</sup>

BNSF's example confirms that this "consideration" will create fertile ground for argument but contribute little to finding solutions. BNSF suggests that, because it backs trains in and out of New South Yard in Houston through T&NO Junction, similar reverse movements

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<sup>10</sup> Decisions under Section 10901(d) reflect this fact-specific analysis. See, e.g., Gateway Western Ry. – Construction Exemption – St. Clair County, IL, ICC F.D. No. 32158, (ICC served Nov. 28, 1994), slip op. at 7-10.

should be acceptable at Placedo. The circumstances differ in several ways.<sup>11</sup> Moreover, reverse movements are undesirable in both locations. UP has criticized BNSF's delay-causing reverse movements at T&NO Junction for years. UP/SP-361, "Applicants' Reply to Comments," Sept. 30, 1998, p. 66.

SP's obligations. The UP/SP merger changed western railroad operating patterns, limiting the value of considering how build-ins would have operated without the merger. BNSF reaches build-ins under the BNSF Settlement Agreement in a variety of ways. Sometimes, BNSF wants to use the same route that SP or UP would have used when building in before the merger. For example, BNSF wants to use UP's GH&H line to reach its build-in to the Bayport Loop, as UP would have before the merger. Sometimes BNSF wants to use a different route, often to its benefit. For example, BNSF will use UP's Angleton Subdivision to reach the Seadrift build-in, even though SP would have reached the build-in on a different route before the merger.<sup>12</sup> The new routes may cause much more interference than pre-merger routes. Pre-merger conditions will become even more difficult to discern as the western rail network evolves, making a search for pre-merger conditions ever more speculative.

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<sup>11</sup> At T&NO Junction, BNSF performs the reverse movements to and from the less used track merely crossing the busier track. For the Seadrift build-in, BNSF would conduct reverse movements on the more heavily used track, causing even worse delays than at T&NO Junction. At T&NO Junction, dispatchers control all switches remotely using Centralized Traffic Control. At Placedo, train crews must detrain to operate manual switches, and one of the rail lines lacks a signal system.

<sup>12</sup> BNSF's build-in will benefit from the UP/SP merger because BNSF gets to operate over UP's direct route between Houston and Seadrift. This route will give BNSF efficient routes to the New Orleans and Memphis gateways. SP had no such route after it abandoned its "Wharton" line.

If BNSF's second consideration applies, however, it must apply both ways. If BNSF wants to avoid investments that would be unnecessary for a separate SP, BNSF should not cause any greater delay than a separate SP's build-in would cause. BNSF argues, for example, that it should not be required to construct a connecting track at Placedo, because SP would not have needed such a connection. But SP also would not have imposed severe operating interference on UP and Tex Mex, as BNSF will. If BNSF wants to avoid investments that SP would not have needed, it must avoid interference with UP service to the same extent SP would have. The parties must adapt to a new world.<sup>13</sup>

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<sup>13</sup> BNSF also rejects responsibility for avoiding interference with Martin Marietta's use of the Port Lavaca Branch to unload rock because, BNSF speculates, SP would not have confronted that problem. This speculative assertion is probably wrong. Had the merger never occurred, SP would have been free to authorize Martin Marietta to unload rock on the branch, just as UP did several years ago. Had SP wanted to build in to Seadrift years later, as BNSF does now, SP would have had to accommodate its customers operation. Ironically, BNSF wants UP to help BNSF provide new competition at the expense of the new competition UP offered against motor carriers when it created this arrangement.

CONCLUSION

Like SP and UP before they merged, BNSF must remedy all material interference between its build-ins and existing rail service. The Board should preserve this responsibility by affirming that Section 10901(d)'s thresholds for interference apply to interference from build-ins under the BNSF Settlement Agreement. The Board also should confirm that BNSF must honor its commitment under the BNSF Settlement Agreement to fund infrastructure when it exceeds those thresholds. Finally, the Board should reject BNSF's inflexible and one-sided procedures for reviewing BNSF operating plans and instead encourage the parties to cooperate to remedy interference.

- 18 -

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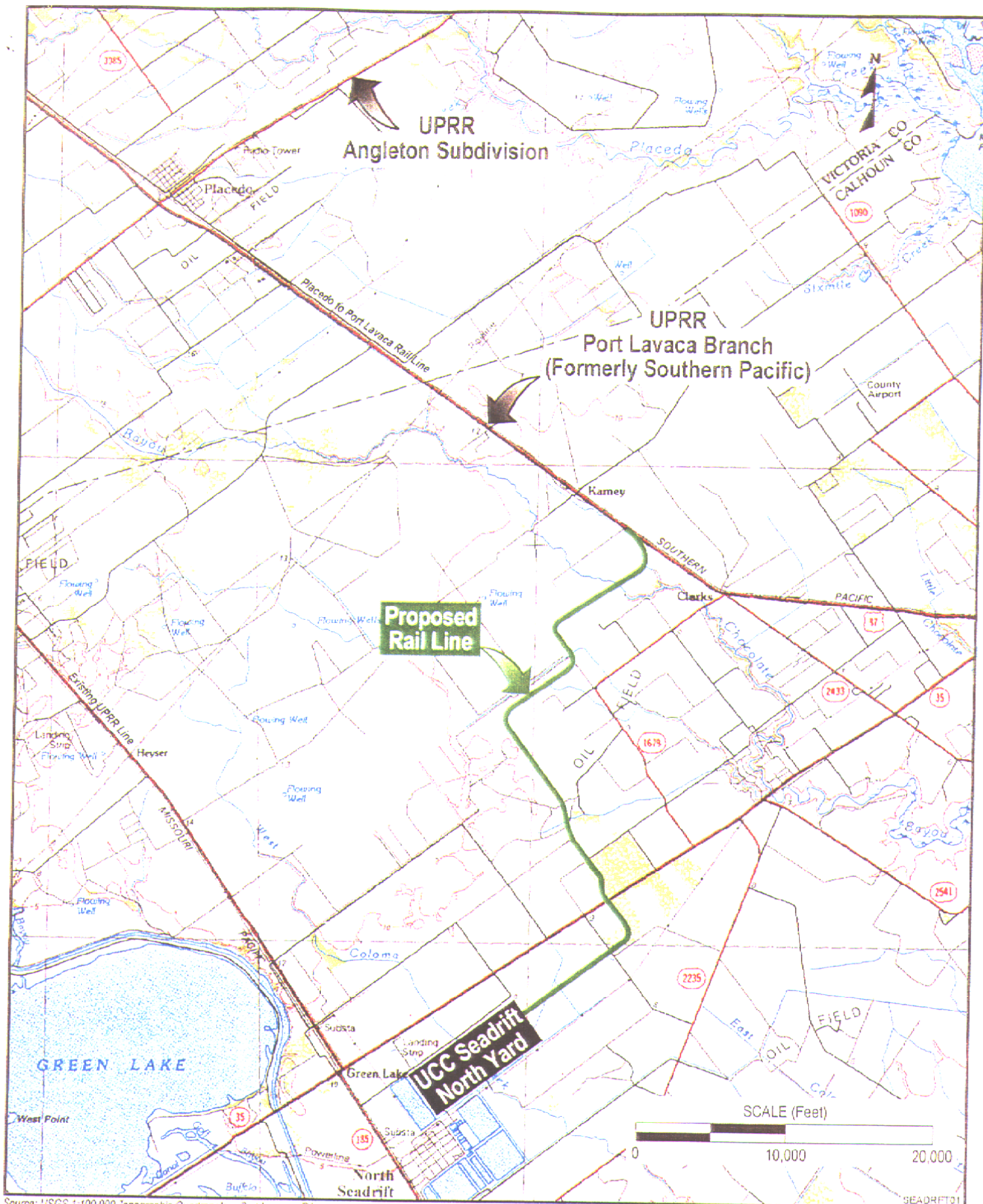


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ATTACHMENT A

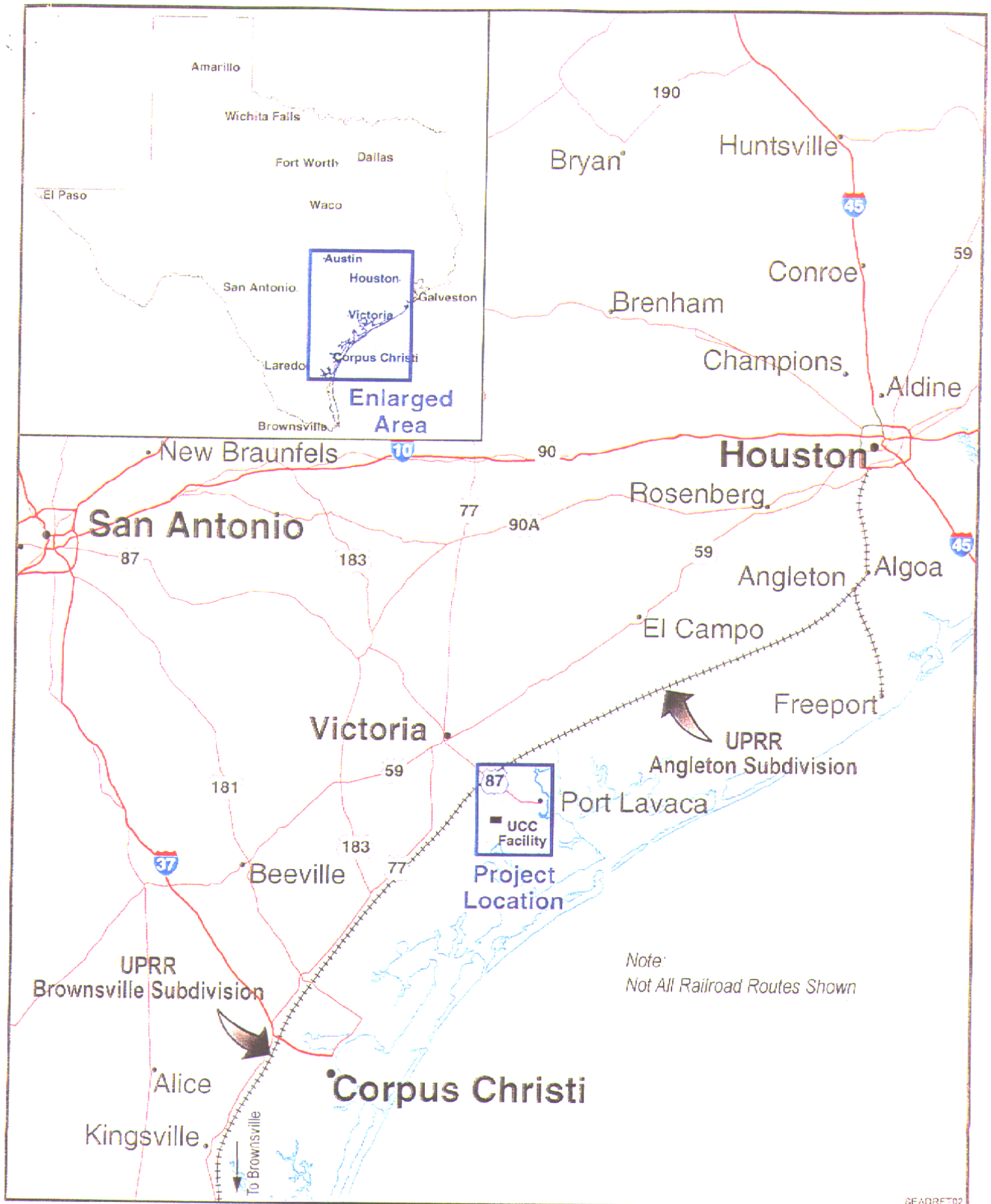


## Seadrift Rail Build-In

Finance Docket No. 34003

## PROJECT LOCATION

Figure 1-2



## Seadrift Rail Build-In

Finance Docket No. 34003

## PROJECT AREA

Figure 1-1



**ATTACHMENT B**

## ATTACHMENT B

As shown on BNSF's maps, which we replicate as Attachment A, BNSF plans to construct a build-in track from near Kamey, Texas, to a shipper facility at Seadrift, Texas. To serve this build-in, BNSF proposes to operate one train daily in each direction between Houston and Seadrift. The southbound trains will use UP's Angleton Subdivision from Houston to Placedo, Texas. At Placedo, the trains must transfer to the former SP Port Lavaca Branch, which runs from Placedo to Kamey and beyond. Northbound trains will follow the same route back to Houston.

BNSF's operating plan would interfere with UP service in two ways. First, BNSF would add two additional trains each day to one of UP's most congested rail lines, the Angleton Subdivision. Second, BNSF would block two UP lines twice daily for an hour at Placedo, where the Angleton Subdivision and the Port Lavaca Branch cross.

BNSF trains would block UP's lines because the infrastructure at the crossing does not include a connection in the east quadrant of the crossing. See Attachment A, p. 2. Instead, BNSF trains would need to back up over a connection in the west quadrant of the crossing. A connecting track in the east quadrant, coupled with powered switches that a dispatcher in Houston could control, would permit BNSF trains to move expeditiously from the Angleton Subdivision onto the Port Lavaca Branch and vice versa. Without the connecting track, however, BNSF's trains must perform a cumbersome maneuver that would block both tracks.

UP estimates that each BNSF southbound train would require approximately 57 minutes to perform the following steps:

The train proceeds through the crossing and comes to a stop on the mainline. Then, after the crew contacts the dispatcher, the dispatcher turns a powered switch. The train must move backward at low speed through the switch and onto the connecting track in the west quadrant of the crossing. Because the connecting track and the branch have no signals, under FRA rules the train crew member must walk ahead of the train or ride the rear of the train to protect it against other trains. The train must stop again when it reaches the hand-thrown switch on the Port Lavaca Branch west of Placedo. The train crew member must throw that switch so that the train can back onto the branch. After the train backs beyond the switch and stops, the train crew member must walk from the rear of the train back to the switch and turn it again. The train would then proceed southeast toward Kamey, crossing the Angleton Subdivision. Each northbound train would perform the same steps in reverse.

These time-consuming movements would delay other trains on the Angleton Subdivision. This line operates near its capacity, and the segment through Placedo is the “bottleneck” segment on the line. That means that delays occur more often on this segment than on any other UP segment of the Angleton Subdivision.<sup>1</sup>

The segment through Placedo can handle 14.8 trains per day with acceptable delays. This is its “fluid capacity.” North of Placedo, the line carries an average of 13.7 trains each day; 10.3 UP trains and 3.1 BNSF trains. Merely adding two more BNSF trains would exceed the line’s fluid capacity. Because those new BNSF trains would block Placedo for an hour each, the delays would be worse than if the trains did not stop.

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<sup>1</sup> BNSF owns one segment included in UP’s Angleton Subdivision. That segment is the most severely congested segment between Houston and the Mexican border.

Tex Mex operates two or more additional trains each day between Houston and Laredo through Placedo. Exercising trackage rights on UP, these trains use the Port Lavaca Branch northwest of Placedo and the Angleton Subdivision southwest of Placedo. They operate over the connecting track at Placedo. Tex Mex trains would be delayed while BNSF trains occupy the connection and both block UP routes. The line southwest of Placedo, with over 17 trains per day, is already well above its fluid capacity, and blocking the crossing twice daily will worsen the situation.

BNSF interference will increase UP and Tex Mex operating costs. BNSF interference will also degrade service for every UP, Tex Mex, and BNSF customer whose cars are delayed because of the BNSF operation at Placedo. UP's customers include the major auto producers, grain shippers who export to Mexico or via the Port of Corpus Christi, and petrochemical shippers along the Gulf Coast.

UP asked BNSF to install a connecting track in the east quadrant at Placedo to avoid these harms and to avoid entirely interfering with Tex Mex trains, but BNSF refused.

BNSF's proposed operating plan also will interfere with a shipper's unusual use of the Port Lavaca Branch. A few years ago, UP and Martin Marietta Corporation cooperated to divert rock movements from Texas highways and transport them by rail to the Kamey area. Martin Marietta supplies major construction projects along the Gulf Coast in that area, including construction of a new state highway. These shipments generate only modest profits for UP, so UP had to limit costs or relinquish the business to trucks. UP allowed Martin Marietta to unload trains directly from the Port Lavaca Branch because the branch had carried no other trains for years.

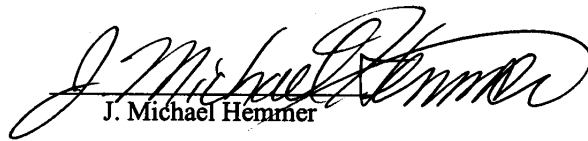
Martin Marietta receives a train of 50 to 60 cars of rock approximately once a week. The customer scoops the rock out of the cars and loads it directly into waiting trucks, a process that requires about 24 hours per train. If BNSF were to operate two trains daily on the branch, Martin Marietta would be required to move its train out of the way, interrupting unloading and multiplying its costs.<sup>2</sup> UP proposed that BNSF construct a siding for Martin Marietta, allowing BSNF trains to avoid interfering with the unloading process.

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<sup>2</sup> Alternatively, the customer would be required to construct a conveyor system and acquire property to store rock. BNSF suggests yet another alternative: relocating the unloading site. Petition, p. 12 n.15. This suggestion, never advanced during the negotiations, deserves study, although it would increase the shipper's costs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of January 2002 a copy of the foregoing "UP's Reply to BNSF's Petition for Clarification Regarding BNSF Interference with UP Service" was delivered to counsel for BNSF by hand and mailed, postage prepaid, to all other parties of record in Finance Docket No. 32760 (Sub. No. 21).

  
J. Michael Hemmer